SUPREME COURT, U. S.

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No. 1066

IN THE

# Supreme Court of the United States

October Term, 1963

SWINGLINE INC., a New York Corporation; SWINGLINE INDUSTRIAL CORPORATION, a New York Corporation; and SPEEDFAST CORPORATION, a New York Corporation,

*Petitioners.*

vs.

OVERLAND MACHINED PRODUCTS, INC., a California Corporation,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

SWINGLINE INC.
*Petitioner,*
32-00 Skillman Avenue,
Long Island City, N. Y.

SWINGLINE INDUSTRIAL CORPORATION and SPEEDFAST CORPORATION,
*Petitioners,*
43-34 32nd Place,
Long Island City, N. Y.

MAXIMILIAN BADER,
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LODER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth-2-0689

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IN THE

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SWINGLINE INC., a New York corporation; SWINGLINE INDUSTRIAL CORPORATION, a New York corporation, and SPEEDFAST CORPORATION, a New York corporation,

*Petitioners,*

vs.

OVERLAND MACHINED PRODUCTS, INC., a California corporation,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

To the Supreme Court of the United States:

Swingline Inc., a New York corporation, Swingline Industrial Corporation, a New York corporation, and Speedfast Corporation, a New York corporation (being the same corporation as Swingline Industrial Corporation by change of name) pray that a Writ of Certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, which reversed a judgment of the Superior Court of the State of California, and held that the petitioners were subject to jurisdiction of the California Courts. The Supreme Court

of California denied petitioners' Petition to Review so that the determination of the District Court of Appeal became final.

## Citation of Opinions Below

(see appendix)

## Jurisdiction

Jurisdiction is based upon 28 USC 1256(3).

The Superior Court of the State of California, by Order dated September 14, 1962, quashed service of Summons purportedly made upon petitioners. The District Court of Appeal, on January 6, 1964, reversed the determination of the Superior Court and held petitioners subject to personal jurisdiction in California. The Supreme Court of California, by Order dated March 4, 1964, refused to review the determination of the District Court of Appeal. This petition is being filed within three (3) months from the date of the determination of the Supreme Court of California denying further review.

The petitioners submit that the determination of the District Court of Appeal was repugnant to the Constitution of the United States, in particular the Fourteenth Amendment thereof, in that the determination would subject petitioners to loss of property without due process of law.

The determination is thus subject to review by Writ of Certiorari under 28 USC 1257(3) as a case

> "• • • where any title, privilege or immunity is specially set up or claimed under the Constitution, • • • "

## Facts

Petitioner Swingline Inc. is a publicly held corporation organized under the laws of the State of New York; its stock is listed on the New York Stock Exchange. It maintains its offices and principal place of business at 32-00 Skillman Avenue, Long Island City, New York. Its business is the manufacture and sale of certain office equipment. It maintains no place of business in California but merely ships merchandise to customers in that state. It maintains no bank account in California, its name is not listed in any directory in California, nor does its name appear on the door of any office in California. One Joe D. Hale Co., an independent contractor, of 10125 Washington Boulevard, Culver City, California, solicits business in California for a number of manufacturers, including Swingline Inc. (Record, pp. 34-36; Lang deposition, p. 34).

Petitioner Speedfast Corporation is a privately held corporation organized under the laws of the State of New York. It maintains its sole office and place of business at 43-34 32nd Place, Long Island City, New York. Its business is the manufacture, sale and distribution of industrial fastening equipment which it sells to various customers. It maintains no place of business in California whatsoever, has no personnel stationed in California, maintains no bank account in the State of California, its name does not appear in any directory of the State of California, nor does it maintain its name on the door of any office in California (Record, pp. 30-33).

Speedfast Corporation was formerly known as Swingline Industrial Corporation and approximately August 31, 1960 (deposition of Marvin Lang, Exhibit 2 annexed) the name of Swingline Industrial Corporation was changed to Speedfast Corporation. Hence, although there

are three (3) petitioners listed herein, in actual fact there are only two (2), Swingline Inc. and Speedfast Corporation.

One of the customers of Speedfast Corporation in California is a separate corporation known as Speedfast of California, Inc. Its officers and directors are different from those of Speedfast Corporation. This corporation is a California corporation having a regular office and place of business in that state. It was incorporated in December, 1961. It is a distributor of industrial stapling equipment, including Speedfast products as manufactured by petitioner Speedfast Corporation. These goods are purchased from Speedfast Corporation and are sold in California by a sales force employed by Speedfast of California, Inc. to various customers primarily located in the State of California (Lang deposition, pp. 6 and 7). Speedfast of California, Inc. is not involved in this petition since obviously this corporation is doing business in the State of California and is subject to jurisdiction there.

About January 8, 1960, which is *prior* to the date of organization of Speedfast of California, Inc., petitioners Swingline Inc. and Speedfast Corporation (then known as Swingline Industrial Corporation) entered into written agreements with the respondent, a California corporation doing business in Los Angeles, California. One of the agreements involved is annexed to the certified transcript following the deposition of Marvin Lang. By the annexed agreement respondent agreed to manufacture certain goods for petitioners in accordance with purchase orders to be placed from time to time by petitioners with respondent. The agreement was signed by one Vincent LeSage who, at that time, was the President of Swingline Industrial Corporation and who further signed the agreement as a purchasing agent of Swingline Inc.

The agreement provided that it was to be interpreted under the laws of the State of California which clause was insisted upon by respondent for its protection since petitioners were not doing business in California and any suit on the contract would obviously have to be brought elsewhere.

Mr. LeSage served as President of Swingline Industrial Corporation (Speedfast Corporation) until August 4, 1961 when he resigned from that office and since that time has had no connection whatsoever with this corporation (Record, p. 89).

During the course of performance of the agreements involved herein certain disputes arose between the parties. Accordingly, *subsequent to the resignation of said Vincent LeSage as President of Speedfast Corporation*, he was requested to take the matter up with respondent in California in order to attempt to arrange an amicable settlement (see letter of September 14, 1961, Record, pp. 100-101).

The attempts by Mr. LeSage were not successful and about July 9, 1962 a Summons and Complaint was served upon one Marvin Lang, the President of Speedfast of California, Inc., as the purported "agent" for the petitioners in California. Motion was made to dismiss the Complaint with respect to petitioners upon the ground that petitioners were not subject to process in California. By Order dated September 14, 1962 (Appendix Exhibit A) the Motion was granted by the Superior Court and service of process upon petitioners quashed. Appeal was then taken by respondent to the District Court of Appeal which Court, on January 6, 1964, reversed the determination of the Superior Court and held that petitioners were subject to service of process in California (Appendix Exhibit B). The Supreme Court of California, by

Order dated March 4, 1964, refused to review the determination of the District Court of Appeal (Appendix Exhibit C). This constituted the final determination of the State Court and the instant Petition was then filed.

## ARGUMENT

**This Court should review the determination made herein since the determination of the State Court, subjecting foreign corporations to its jurisdiction under the facts of this case, constitutes clear violation of the "Due Process" clause of the Fourteenth Amendment.**

Pursuant to the provisions of the Fourteenth Amendment to the Constitution of the United States no state may deprive any person (corporations included) of property without due process of law. No personal judgment may be issued by a State Court unless this Court can obtain personal service of process over the party against whom it seeks to assert jurisdiction (*Pennoyer* v. *Neff*, 1877, 95 US 714). It has been held, in recent decisions of this Court, that all that need be done to subject a foreign corporation to suit in a forum state wherein the corporation does not do business is that the corporation have certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice (*International Shoe Co.* v. *Washington*, 326 US 310). Subsequently in *McGee* v. *International Life Insurance Co.*, 1957, 355 US 220, jurisdiction over a foreign corporation was sustained where the foreign corporation delivered a contract of life insurance to an insured residing in California, the premiums were mailed from California and the insured was a resident of the State of California

when he died. The Court there pointed out the importance of giving the beneficiaries a forum close at hand where they could try a case involving a small sum of money.

The subsequent cases have apparently narrowed the doctrine of *McGee* to some extent. Thus, in *Hanson* v. *Denckla*, 1958, 357 US 235, jurisdiction over a foreign trust company was held to be lacking where the foreign trust company had no office in the state and transacted no business there but where the testatrix-settlor under the trust was a domiciliary of the state in which jurisdiction was sought to be asserted. Subsequently this Court in *Western Union Telegraph Co. of Pennsylvania by Gottlieb*, 368 US 71, held that the State Courts had no jurisdiction to pass on the disposition of certain assets *located in the state* where necessary parties to the controversy could not be served within the state.

In the instant case, if the Court should not review this determination, any party making a contract with any other party residing outside of the maker's home state would be subjected to jurisdiction of the Courts of the foreign state merely by reason of the act of making a contract with such non-resident. It is true that with the development of communication contracts are now being made between individuals separated by large distances but such acts cannot dispense with the traditional requirements of due process. To carry the situation set forth in the case at bar to its logical conclusion a party in New York could make a contract with a party located in Mississippi concerning the manufacture of certain goods to be made in Mississippi and delivered to New York. Merely by reason of the fact that the contract was made in Mississippi the Mississippi corporation could obtain jurisdiction over the New York corporation in the

State of Mississippi and thus subject the New York corporation to suit in a forum far away from its home territory.

It is respectfully submitted that such a result is unthinkable under the "due process" clause of the Fourteenth Amendment. Hence, unless petitioners and others are given relief in this Court, they will be subjected to jurisdiction of a foreign state in which they do not do business nor even have the requisite "contacts" required under some of the recent cases.

Thus the issues in this case transcend the rights of the parties involved. Petitioners submit that this Court ought to review the instant determination and make the appropriate determination setting forth the limits of jurisdiction of a state over foreign corporations not doing business therein.

Where constitutional issues are involved this Court has repeatedly held that a full and thorough review both of the law and facts ought to be made (*Craig* v. *Harney*, 1947, 331 US 367; *Southern Pacific Co.* v. *State of Arizona ex rel. Sullivan*, 1945, 325 US 761; *Stroble* v. *State of California*, 1952, 343 US 181; *Doremus* v. *Board of Education*, 1952, 342 US 429; *Ker* v. *State of California*, 1963, 374 US 23; *Napue* v. *People of the State of Illinois*, 1959, 360 US 264).

The petitioners would also like to call this Court's attention to the line of cases wherein this Court has held that where a case is of importance or where substantial constitutional questions are present Certiorari will be granted. See, for example, *Glus* v. *Brooklyn Eastern District Terminal*, 359 US 231; *Leiter Minerals, Inc.* v. *U. S.*, 352 US 220; *Southwestern Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 US 411; *U. S.* v. *Union*

*Pacific Railroad Co.*, 353 US 112; *Porter* v. *Aetna Casualty & Surety Co.*, 370 US 159; *Morales* v. *City of Galveston*, 370 US 165; *Calbeck* v. *Travelers Insurance Co.*, 370 US 114 and *Turnbow* v. *C. I. R.*, 368 US 337.

## CONCLUSION

**The instant petition for a writ of certiorari should be in all respects granted.**

Dated: April 28, 1964.

Respectfully submitted,

SWINGLINE INC.,
SWINGLINE INDUSTRIAL CORPORATION,
SPEEDFAST CORPORATION,
*Petitioners.*

MAXIMILIAN BADER,
I. WALTON BADER,
*Counsel.*

## APPENDIX EXHIBIT A

**Order of the Superior Court of the State of California Quashing Service of Process**

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Dept. 66

Date: Sept 12, 1962

Hon. LEON T. DAVID, Judge

R. F. JARRATT, Deputy ~~Clerk~~

796750

OVERLAND MACHINED PRODUCTS, INC.

vs

SWINGLINE, INC., etc, et al.—

NATURE OF PROCEEDINGS:

200000

Motion of defendants Swingline, Inc. and Speedfast Corporation, formerly known as Swingline Industrial Corp, appearing specially for the sole purpose of this

motion only, to quash service of summons submitted August 22, 1962)

Motion Granted (267 US 330; 20 C2nd 720, 728)

Counsel notified.

This Minute Order was
Entered

Sep 14 1962

William G. Sharp, County Clerk
and Clerk of the Superior
Court

C. A. RHETTA
By C. A. Rhetta, Deputy

## APPENDIX EXHIBIT B

### Opinion of the District Court of Appeal Reversing Determination of the Superior Court

In the District Court of Appeal of the State of California, Second Appellate District, Division Four

Overland Machined Products, Inc., a California corporation, Plaintiff and Appellant, vs. Swingline, Inc., a New York corporation; Swingline Industrial Corp., a New York corporation; and Speedfast Corporation, a New York corporation, Defendants and Respondents. Civil No. 27032

Filed Jan. 6, 1964.

Appeal from a judgment of the Superior Court of Los Angeles County. Leon T. David, Judge. Reversed.

Action involving state jurisdiction over foreign corporations. Order granting motion to quash service of summons on foreign corporations reversed.

George C. Black & Patrick Kerrigan, and George C. Black, for Plaintiff and Appellant.

Ely, Kadison & Quinn, and Stuart L. Kadison and Daniel S. Mark, for Defendants and Respondents.

Two New York corporations executed a written contract with a California corporation, and later a purchase order based on the written contract, for the manufacture of certain stapling devices. A third corporation, a California corporation, having all of its stock owned by the minority stockholders of one of the New York firms, actually merchandized the products in California.

The New York corporations were purportedly served with process in the instant action by service on the presi-

dent of the California corporation as "general manager" in this state for the New York firms. The latter firms moved to quash such attempted service of summons and complaint and the motion was granted. Plaintiff appeals.

The test for amenability of foreign corporations to service of process of state courts is no longer a question of whether there were a sufficient number of acts within the state to have constituted "doing business" in the old commercial sense, but is rather a qualitative problem. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, established the "fair play and substantial justice" theory which has been incorporated in California decisions. The present test of amenability to service is whether the foreign corporation has committed "any act or acts creating such contact with the state as to make it reasonable to require the foreign corporation to defend the particular suit which is brought, providing the maintenance of the suit does not offend traditional notions of fair play and substantial justice." (*James R. Weiss, Ltd. v. Superior Court*, 215 Cal.App.2d [1] ..... ," and *Sibs v. National Engineering Co.*, 221 Cal.App.2d [2] .....)

The New York firms contend they are not "doing business" in this state; that isolated sales to their California affiliate do not constitute "doing business." But they interpret "doing business" to mean commercial activity as it was weighed and construed prior to the more recent cases to which we have previously referred. Such activity is no longer the exclusive test for amenability to service. As indicated, "contact" of such nature as to make it reasonable to require submission to jurisdiction, under the facts of the case, is the present test.

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[1] 215 A.C.A. 280, 286.

[2] 221 A.C.A. 625.

In this case the authorized officer of one of the New York firms came to California and personally inspected the facilities of plaintiff to determine its capacity to perform an intended contract for the manufacture of stapling devices. A written contract was negotiated by such officer; a purchase order was issued implementing such contract; the work was performed in California; the contract provided for interpretation pursuant to the laws of California; the intended outlet for the product was the California "subsidiary" corporation; payment for such work was denied plaintiff; and suit has been instituted here for collection. Such circumstances present more than the minimum contact requisite for the assumption of jurisdiction.

While the president of the California Corporation, in constant contact with the New York firms, was not an officer, agent or employee of those firms, his position, in the scheme of things, was such as to most likely insure notice to the New York firms of any notice or process served upon him affecting their interests. And such did occur. Now, because of the purported separation in corporate structures and their officialdom, the foreign corporations seek immunity from this state's jurisdiction for technical reasons that present the very cause for the requirement that an agent be appointed for the acceptance of service as a condition for doing business in this state.

The expanded connotation accorded the term "general manager," used in section 6500 of the Corporations Code, is considered in *Cosper v. Smith & Wesson Arms Co.*, 53 Cal.2d 77, wherein the court stated:

> "The second consideration in testing the validity of service under section 6500 of the Corporations Code is whether the person served is within the statutory designation—here 'the general manager in this State' for Smith and Wesson. In this re-

gard, it has been said that 'every object of the service is obtained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the service made,' and by service on such an agent, 'the requirement of the statute is answered.' (*Eclipse Fuel Eng. Co. v. Superior Court, supra*, 148 Cal. App.2d 736, 746.) . . . Here, it reasonably appears that Lookabaugh as a manufacturer's representative . . . would have ample regular contact with Smith and Wesson and would be of 'sufficient character and rank to make it reasonably certain' that Smith and Wesson would be apprised of the service of process. . . . In short, the arrangement of Smith and Wesson with Lookabaugh appears, in the light of the president's affidavit, to have given Smith and Wesson substantially the business advantages that it would have enjoyed 'if it conducted its business through its own offices or paid agents in the state.' (*Eclipse Fuel Eng. Co. v. Superior Court, supra*, 148 Cal.App.2d 736, 740); and such arrangement was sufficient to constitute Lookabaugh 'the general manager in this State' for purposes of service of process on Smith and Wesson: (Corp. Code, § 6500.)"

From the above cases and the other authorities cited therein it is apparent that distinctions based on details of contract, agency or formal employment are subordinate to the main purpose to be served by the relationship, namely, amenability to service. "Every object of the service is obtained when the agent served is of sufficient *character and rank* to make it reasonably certain that the defendant will be apprised of the service made." (Emphasis added.) (*Eclipse Fuel Eng. Co. v. Superior Court, supra*, 148

Cal.App.2d 736.) "Ample regular contact" is stated, in *Eclipse*, as the reason for the rule. Such regular contact existed in the instant case. The California firm regularly reported its activities to New York, including correspondence at least once a week and a monthly report regarding sales volume in this state reflecting its operations, profit and loss, sales and accounts receivable. While the business of the California corporation is not that of the New York firms, from the foregoing general statement, it can be seen that sufficient contact by the New York firms has been made with the state that fair play and substantial justice require defendants to respond to the action brought in this forum.

The order quashing service of summons and complaint is reversed.

Burke, *P. J.*

We concur:

Jefferson, *J.*
Kingsley, *J.*

## APPENDIX EXHIBIT C

**Order of the Supreme Court of California Denying Petition to Review Determination of District Court of Appeal**

ORDER DUE
March 6, 1964

ORDER DENYING HEARING

AFTER JUDGMENT BY DISTRICT COURT OF APPEAL

2nd District, Division 4, Civil No. 27032

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

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OVERLAND MACHINED PRODUCTS, INCORPORATED,

v.

SWINGLINE, INCORPORATED, ET AL.

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Respondents' petition for hearing Denied.

GIBSON
Chief Justice

I, William L. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the pre-

ceding is a true copy of an order of this Court, as shown by the records of my office.

Witness by hand and seal of the Court this 13th day of April A. D. 1964.

WILLIAM L. SULLIVAN
By R. JOHNSON
Deputy Clerk

(SEAL).

Filed Mar 4—1964

WILLIAM I. SULLIVAN, Clerk
By S. K.
Deputy